United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

B pds

75-1260

To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

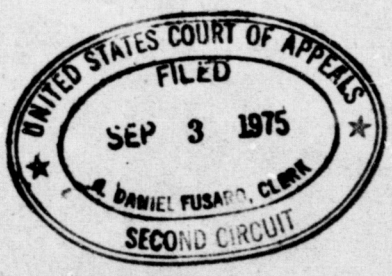
MAX MEYERS,

Appellant.

Docket No. 75-1260

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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PAGINATION AS IN ORIGINAL COPY

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE [redacted] 75 CRIM. 4

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	Michael C. Eberhardt, Sp. Atty
	791-1156
MAX MEYERS	
	For Defendant:
	Joseph Panzer and Arnold E. Wallach
	305 B'Way NYC

ABSTRACT OF COSTS (12)	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
Fine,							
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,	18						
~~Witnesses~~	1623						
Perjury.							
(~~One~~ Two Count)							

DATE	PROCEEDINGS
1-2-75	Filed indictment.
1-13-75	Deft. present (atty. present) enters a plea of not guilty, 10 days for motions. Deft. released on his own recognizance and fingerprinted and photographed. Bonsal, J.
	Case assigned to Cannella, J. for all purposes.
1-14-75	Filed notice of appearance by Joseph Panzer and Arnold E. Wallach 305 B'Way NYC
1-21-75	Filed defts Affidavit and Notice of Motion for an order suppressing all the evidence in this case etc, as indicated rtble before Cannella, J. on 1-24-75.

U.S.A. VS. MAX MEYERS. 75 Cr. 4. CANNELLA,J.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
-21-75	Filed defts memorandum of law.		
-21-75	Filed defts Affidavit & Notice of Motion for an order dismissing the indictment herein as indicated rtble Before Cannella, J. on 1-24-75.		
-21-75	Filed defts memo of law in support of motion to dismiss the indictment etc, as indicated.		
1-24-75	Filed affdvt.in response to pre-trial motions.		
1-24-75	Filed Govt's memorandum of law.		
1-29-75	Filed memorandum decision and order #41827..Deft is charged with given false testimony before a Grand Jury***He now moves for the entry of an order pursuant to FRP IZ dismissing the indictment..and to suppress all evidence***the motions are disposed of in accordance with the memorandum and are denied in all respects....Cannella,J. (Mailed notice) ---		
1-31-75	Filed Govt's requests to charge..		
1-31-75	Filed Govt's proposed examination of prospective jurors..		
~~xx2x4x75x Filed x Govt's xxxxx~~ 2-3-75	Filed Waiver of trial by jury.....Trial begun without jury & concluded - Dec.Res. Cannella,J.,.....		
2-14-75	Filed memorandum decision and Opinion #41887***A trial was had before this Court sitting without a jury**Deft has moved for a judgment of acquittal on each count under Rule 29..That motion is hereby denied. The deft. is found guilty as charged. A presentence investigation is ordered and matter is placed on the calendar for 9:30 on March 25-75 for sentence..Present bail conditions are cont'd..So Ordered. CANNELLA,J..... (Mailed notice)		
2-18-75	Filed stip.that if the deputy forelady of the Oct.1 ,1973 G.J.were called as a witness she would testify that on Oct.3-74 a Quorum was present..		
2-18-75	Filed deft's memorandum of law.....		
2-18-75	Filed deft's memorandum of law.....		
3-14-75	Filed affdvt.& notice of motion to dismiss indictment or arrest judgment..Ret.3-25-75		
3-14-75	Filed memorandum in support of above motion		

DATE	PROCEEDINGS
3-19-75	Filed affdvt.of Michael C.Eberhardt,Spec.Atty. in response for motion to dismiss.
3-19-75	Filed memorandum of law...(Govts)
4-24-75	Filed transcript of record of proceedings, dated 2-3-75
6-25-75	Filed memorandum and order #42664 On 2-13-75 deft was found guilty~~xxxxx~~ he has now moved,in advance of imposition of sentence to dismiss the indictment etc. The deft's post-trial motion is hereby denied. Sentence shall be imposed on June 30-75 at 9:30 A.M...So Ordered.....Cannella,J.. Mailed notice
6-30-75	Filed Judgment & Commitment.. (atty. present).. deft. is hereby committed to the custody of the Atty. General for a period of Two (2) Months on count 1... ~~One~~(1) ~~Year on count 2...~~ Execution of sentence on count 2 is suspended.. Deft. is placed on probation for a period of ONE (1) YEAR, subject to the standing probation order of this court... Deft. continued on ROR pending appeal.. Cannella, J.
7-8-75	Filed deft's notice of appeal to USCA from Judgment of 6-30-75. Copies mailed to : U.S. Atty. and deft. at 201 E. 28th St-NYC.
7-8-75	Filed Order granting deft. leave to proceed on appeal in forma pauperis... Cannella, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v -	:	INDICTMENT
MAX MEYERS,	:	74 Cr.
Defendant.	:	75 CRIM. 4

The Grand Jury charges:

COUNTS ONE and TWO

1. On or about October 3, 1974, in the Southern District of New York, MAX MEYERS, the defendant, having duly taken an oath as a witness that he would testify truthfully before a Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the Southern District of New York, unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations to said Grand Jury.

2. At the time and place aforesaid, the said Grand Jury was conducting an investigation into alleged violations of Federal Law, including violations of Sections 2, 371, 1951, 1962 and 1952 of Title 18, United States Code and Section 186, Title 29, United States Code, to determine whether, among other things, any persons involved in the trucking business or in any other business in New York City's "garment district" had conspired to commit, committed, or caused, counselled or aided in the commission of violations of federal laws prohibiting extortion; the acquisition and maintainance of interest and control of enterprises engaged in or affecting interstate and foreign commerce through patterns of racketeering activity and collections of unlawful debts; interstate travel and the use of interstate facilities to commit crimes of violence and facilitate unlawful activities; and also prohibiting the payment to or receipt of money and other things of value by union officials from employers.

3. It was material to said inquiry to ascertain the extent of the defendant MAX MEYERS' knowledge of and participation individually and with others in any of the prohibited activities enumerated in paragraph 2 above, to further determine specifically the extent of the defendant's knowledge of and participation individually and with others in the illegal practices, whereby certain clothing manufacturers and contractors are not free to do business with trucking companies of their choice, but instead are "registered to" or "married" to a particular trucking company and to further determine the extent of the defendant MAX MEYERS' participation with others and conversations with others concerning the prohibited activities enumerated in paragraph 2 above.

4. At the time and place aforesaid MAX MEYERS, appearing as a witness under oath before said Grand Jury, did testify falsely with respect to the aforesaid material matters as follows:

* * *

Q. Did you ever have any conversations with this man Whelan about what truckers he should use?

A. No, sir.

Q. Did you ever tell him that he had to use or should use one particular trucker, that he was supposed to use one trucker and not use any other trucker?

A. No, sir.

* * *

Q. Did you ever have any conversations with Mr. Whelan on the subject of whether he should use Trinity Trucking as a trucker?

A. No, sir.

Q. Did you --

A. I think Mr. Evola was the truckman.

Q. Well, did you ever have any conversations with Mr. Whelan in which you told him that he had to use or should use Mr. Evola's company for all his trucking?

A. No, sir.

* * *

Q. -- have you ever heard of the phrase or term that a manufacturer and a trucker are registered, that is a certain trucker is registered to a certain manufacturer or a certain manufacturer is registered to a certain trucker? Forget about unions and forget about contractors.

A. Sir, I answered you that. I heard that phrase a million and one times.

Where I hear it, I wouldn't know. I said yes.

Q. What does it mean in that context?

A. Like you said, I say it could mean marriage. It could mean anything.

Q. I am not asking what it could mean. I am not asking what I said. I am asking what you have understood it to mean on a million and one occasions on which you have heard it.

A. That you got to use that trucker, I said that to you, sir.

Q. That you got to use that trucker?

A. That is right. I heard that phrase a zillion and one times in my life.

Q. Have you ever used the phrase itself in the sense that a certain manufacturer had to use a certain trucker?

A. You mean did I ever suggest it to anybody? No, sir. I did not.

Q. You are sure about that?

A. Definitely not. I will swear to that over and over and over and over. Never did. Never told any manufacturer to use or what to use. Never solicited.

Q. You never told any manufacturer that he was registered to a certain trucker or a certain trucker was registered to him in a sense of having to use that certain trucker in a sense that you just described?

A. I wouldn't remember that, sir. I don't keep conditions down. You asked the question. Whether I can remember, all I would say to you the phrases are around. The conditions I know. Whether I told anybody -- I don't remember that, sir. I am not in the trucking business, sir.

Q. You have lost me.

A. Well, I will try to find you again, sir.

Q. I thought you just got through telling me, Mr. Meyers, that you had never told anybody that you had to use or should use a certain trucker or didn't you just tell us that a few minutes ago?

A. I said I don't remember of anybody ever asking me that, and I said I will use a trucker. I haven't changed truckmen for 25 years.

I used Trinity Trucking because my brother was an owner at one time of the condition down at Trinity Trucking.

Q. I am sorry? Didn't you tell us a few minutes ago that you had never told anybody that they had to use a certain trucker, is that right?

A. I would say to the best of my memory I never told anybody.

* * *

Q. You are saying to the best of your memory you have never told anybody that they ought to use or should use a certain trucker, is that right?

A. Yes.

COUNT TWO

Q. Did you ever tell Whelan that he should give money or gifts to officials of any union?

A. I knew Whelan real well and I told him -- I said you got a very able lawyer. Go to your lawyer. You come to me a lot of times.

I can't do anything for myself, how am I going to do anything for you.

I went out of business on that condition.

Q. Mr. Meyers, my question was did you ever tell Mr. Whelan?

A. To give any money?

Q. That he should give money or Christmas gifts to unions, to union officials rather.

A. I would say to the best of my memory, I would say no.

Q. Do you understand what I am asking you, I am asking you in substance did you ever tell Mr. Whelan that he should pay off any union officials?

A. I understand your question. I would say offhand, I would say no.

Q. I am not asking you to be offhanded about it.

A. I couldn't remember specifically, because I couldn't tell him who to pay, because I don't know, no union officials to pay in the Cutters' Union. I answered that question before.

Q. You would remember, would you not, whether you told Mr. Whelan or advised Mr. Whelan to give gifts or presents to union officials, you would remember that if you told him that, wouldn't you?

A. I would say yes, I would remember that. I don't remember. I would say 99 per cent that I would remember that I never told him to give -- I told him to see his lawyers.

He used to run to me for favors. He used to keep calling me.

I said what can I do?

Q. You were saying you are 99 per cent sure you never told Whelan he should ever give any kind of gifts or Christmas gifts to union officials, is that correct?

A. I would even go further and say even 100. To the best of my memory is concerned. I said you are a big boy, do anything you want.

Q. Well, did you ever have any conversation with Mr. Whelan about whether he should give money or gifts of any kind to any union officials, Mr. Meyers?

A. I don't think he ever asked me that type of question.

He used to come to me.

He had trouble with cutting and he came to me and I said go and see your lawyer.

I said you got a very capable lawyer.

Q. Is the answer to my question no, you never had any?

A. I would have to say no.

5. The aforesaid testimony of the defendant, MAX MEYERS, as he then and there well knew, was false.

(Title 18, United States Code, Section 1623)

Irving J. Shiffman
FOREMAN

Paul J. Curran
UNITED STATES ATTORNEY
Southern District of New York

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

MAX MEYERS,

Defendant.

INDICTMENT

74 Cr. _____

PAUL J. CURRAN

United States Attorney

A TRUE BILL

Dina B. Haden

Deputy *Foreman*

FPI—8S—1-13-70—20M—4925

U.S. DISTRICT COURT FILED JAN 2 1975 S.D. OF N.Y.

Jan 13 1975 Deft present (Atty Joseph Longo present) Deft enters a plea of Not Guilty & Case assigned to Cannella J. 10 days for motions. Deft ROR cont'd P/P 7th

Bonsal J.

3-FEB 1975 — TRIAL BEGUN BEFORE CANNELLA J. & WITHOUT A JURY. (WAIVER SIGNED & FILED).

TRIAL CONCLUDED — DEF Rec'd.

CANNELLA J.

THOMAS C. RYAN

JUN 30 1975

DEFT. MAX MEYERS (ATTY PRESENT) RALPH PANZOL

SENTENCED TO TWO (2) MONTHS ON COUNT 1

" ONE (1) YEAR ON COUNT 2. EXECUTION OF SENTENCE IS SUSPENDED ON COUNT 2. DEFT PLACED ON PROB. FOR A PERIOD OF ONE (1) YEAR SUBJECT TO STANDING PROB. ORDER OF THIS COURT.

DEFT ADVISED OF HIS RIGHT TO APPEAL

DEFT CONT'D ON ROR PENDING APPEAL

CANNELLA, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES of AMERICA : MEMORANDUM DECISION AND ORDER

-against- :

MAX MEYERS, :

Defendant. : 75 Cr. 4 (JMC)

- X

#41827

Appearances:

Paul J. Curran, U.S. Attorney, S.D.N.Y. (Michael C. Eberhardt, Special Atty., Dept. of Justice and Asst. Atty.-in-Charge, New York Strike Force, of counsel), for the Government.

Joseph Panzer, Esq., New York City, for Defendant.

CANNELLA, D.J.:

In the instant indictment (75 Cr. 4), Max Meyers is charged with having given false testimony before a Grand Jury of this District in violation of 18 U.S.C. § 1623.[1] He now moves for the entry of an order pursuant to Fed.R.Crim.P. 12(b)(2) dismissing the indictment, as well as for an order pursuant to Fed.R.Crim.P. 41 "suppressing all the evidence in this case, as well as all leads therefrom, based on electronic surveillance." The motions are denied.

MOTION TO DISMISS

On October 3, 1974 (at a time when his counsel was present outside of the Grand Jury room), the defendant was called before a Grand Jury of this District and asked to testify concerning certain aspects of the trucking business in New York City's "garment center." After advising Meyers that his testimony would be under a grant of immunity, the prosecuting attorney stated:

> Mr. Meyers, do you also understand that you testify here before this grand jury subject to the penalties of perjury. That is you have to give honest answers to the questions that are asked of you and if you give any willfully false answers to the grand jury that would constitute the crime of perjury. Do you understand that?

(Grand Jury Minutes of October 3, 1974 at 33). It is contended by the defendant that having so warned him of the potential criminal liability which might arise from his making false statements to the Grand Jury, the Government was thereby also obligated to instruct him concerning the recantation provision contained in 18 U.S.C. § 1623(d)[2/] and that its failure to do so warrants the dismissal of the present indictment.

In so moving, the defendant has placed sole reliance upon a decision of the Third Circuit in United

States v. Lardieri, 497 F.2d 317 (3 Cir. 1974) [Lardieri I], wherein the court stated (at 321):

> If the recantation provision is to serve its purpose, it would seem to follow that in some circumstances there may be a requirement that the witness know of its existence.
>
> Although there is no duty generally on the part of the government to explain a grand jury witness's right to him (citation omitted), this would not necessarily cover the situation where a government attorney chooses to enlighten the witness on the punitive provisions of the false swearing statute when the witness has no knowledge of the recantation provision.

While the thrust of the Third Circuit's opinion in Lardieri I is supportive of this defendant's present application, the vitality of that decision has been completely undercut by the same panel's subsequent decision on reargument (rendered after full briefing by the parties).[3/] United States v. Lardieri, _____ F.2d _____, No. 73-1750 (3 Cir. Dec. 18, 1974) [Lardieri II]. In Lardieri II, the court abandoned its earlier decision and concluded that there existed no statutory or constitutional mandate requring the prosecutor to inform a Grand Jury witness of the existence of the recantation provision contained in § 1623(d). The court exhaustively

traced the legislative history of the statute (Slip Op. at 5-7) and concluded therefrom:

> Lardieri has not demonstrated that a requirement that the prosecutor notify witnesses of the recantation provision would induce more people to recant. However, dismissing perjury indictments where the prosecutor has not given such notice would create a new impediment to successful perjury prosecutions, thereby jeopardizing the deterrent effect Congress specifically sought to establish by rendering perjury convictions easier to obtain. The statutory history, therefore, does not reveal a Congressional intent that prosecutions be dismissed where such warnings are not given.

(Slip Op. at 7). Similarly, the court considered the viability of the proposed "recantation rule" in light of its supervisory powers over the conduct of Grand Jury proceedings, but stated that

> even if we were to concede that requiring the proposed notice would to some degree increase the incidence of recantation by those who have testified falsely, it would be improper for us, in the exercise of our supervisory powers, to dismiss prosecutions because of the lack of such advice from the prosecutor, thereby endangering the stimulus provided by the threat of criminal sanctions.

(Slip Op. at 8).[4/] Thus, it is well perceived that the Third Circuit has now resolved that the purpose of the recantation provision contained in § 1623(d) is not

frustrated when a prosecutor is permitted to remind a Grand Jury witness of the penalties for perjury without telling him of the recantation provision as well. The court held that to do otherwise and thereby authorize the "dismissal of ... indictment[s] because of the lack of notification to [the defendant] of the recantation provision would disturb the balance Congress has advertently established between the competing interests of prosecution and recantation." (Slip Op. at 8.)

This Court finds the views expressed by Judge Adams for the Third Circuit in Lardieri II to be persuasive and to harmonize properly the role of the recantation provision embraced in § 1623(d) with the broader scheme of the statute. Lardieri II, unlike Lardieri I, was decided after full briefing by the parties and after a thorough and detailed analysis of the legislative history and policy considerations by the court. It strikes a proper balance within the statutory scheme and absent a contrary direction from our Court of Appeals (cf., United States v. Lee, _____ F.2d _____, No. 74-1925 (2 Cir. Jan. 9, 1975)), we conclude that a prosecutor who has advised a Grand Jury witness of the criminal sanctions that arise from the giving of false testimony to a Grand Jury is not, for that reason, obligated to

advise the witness of the recantation provisions contained in § 1623(d) as well. Accordingly, the defendant's motion to dismiss the present indictment is hereby denied in all respects.

MOTION TO SUPPRESS

The second of the defendant's present motions is addressed to the suppression of certain evidence which is alleged to have been obtained by the Government through the use of electronic eavesdropping. Specifically, Meyers seeks to suppress such of his statements (and the fruits thereof) as were made "to a government witness who was equipped so as to record the defendant's voice." (Panzer Affidavit at 1). It is asserted that such conversations were recorded by the Government without first obtaining a search warrant and, therefore, were obtained in derogation of defendant's Fourth and Fifth Amendment rights, as well as in contravention of 18 U.S.C. § 2510 et seq.

It is not disputed on the motion that the Government witness to whom Meyers allegedly made the involved statements had previously consented to being "wired" so as to record the conversations. Thus, the present claim is properly concluded by the decision of

the Supreme Court in United States v. White, 401 U.S. 745 (1971), wherein the Court reaffirmed the continued vitality of On Lee v. United States, 343 U.S. 747 (1952) and Lopez v. United States, 373 U.S. 427 (1963) and upheld the use of recording and transmitting devices concealed on the person of a party to the monitored conversation with his consent but without a warrant or other judicial scrutiny. See also, United States v. Warren, 453 F.2d 738, 743 (2 Cir.), cert. denied, 406 U.S. 944 (1972); United States v. Koska, 443 F.2d 1167, 1170 (2 Cir.), cert. denied, 404 U.S. 852 (1971); United States v. Kaufer, 406 F.2d 550 (2 Cir.), aff'd, 394 U.S. 458 (1969) (per curiam); cf., United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2 Cir. 1973), cert. deried, 415 U.S. 984 (1974).[5/]

The defendant contends, however, that the plurality opinion in White is not controlling hereon in that it conflicts and cannot be reconciled with the Court's earlier decision in Osborn v. United States, 385 U.S. 323 (1966). This assertion is of little moment. As Judge Friendly has pointed out in United States v. Bonanno, 487 F.2d 654, 657 n. 1 (2 Cir. 1973), the plurality decision in "White is ... authoritative on the constitutional validity of recording and transmitting

devices on the person...." See also, Holmes v. Burr, 486 F.2d 55, 60 (9 Cir.), cert. denied, 414 U.S. 1116 (1973).[6/] Similarly, the defendant's reliance upon the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., is unavailing because, as Judge Friendly has stated, "in providing for interception of wire communications pursuant to warrant, [the statute] expressly excepted from the warrant requirement a case where 'one of the parties to the communication has given prior consent to such interception.' 18 U.S.C. § 2511(2)(c) -- a statute referred to with seeming approval in United States v. White, supra, 401 U.S. at 753." United States v. Bonanno, 487 F.2d at 658.

As Mr. Justice White pointed out for the plurality in United States v. White, 401 U.S. at 751:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. Hoffa v. United States, 385 U.S., at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on

his person, Lopez v. United States, supra; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. On Lee v. United States, supra. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

We find the plurality decision in White controlling on the instant motion and, for that reason, the defendant's motion to suppress electronically obtained evidence is hereby denied in all respects.

The defendant's motions are disposed of in accordance with the foregoing memorandum and are denied in all respects.

It is SO ORDERED.

John M Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
January 29, 1975.

F O O T N O T E S

1/ The statute provides, inter alia, that:

> Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2/ Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

3/ In Lardieri I the court acknowledged that this issue "was neither briefed nor raised below." 497 F.2d at 320.

4/ The Third Circuit also rejected the concept of advising a grand jury witness of the recantation provision of the statute as an element of due process and fundamental fairness. (Slip Op. at 8-9). We believe this view to be a correct one and it is bolstered where, as here, the witness is represented by counsel at the time he appears before the Grand Jury.

5/ The courts of other circuits have, in the recent past, unhesitatingly adhered to the views of the plurality in White. See, e.g., United States v. Cosby, 500 F.2d 405, 406 (9 Cir. 1974); Stephan v. United States, 496 F.2d 527, 528 (6 Cir. 1974); United States v. Lippman, 492 F.2d 314, 318 (6 Cir. 1974), cert. denied, 43 U.S.L.W.

3388 (U.S. Jan. 13, 1975); United States v. Palazzo, 488 F.2d 942, 948 (5 Cir. 1974); United States v. Kline, 366 F.Supp. 994, 996 (D. D.C. 1973) ("It is now conclusively established that the Fourth Amendment is not violated where, during an investigation, a Government agent consents to record his private conversation with others who are suspect without revealing his true identity or purpose."); United States v. Leonard, 363 F.Supp. 1348, 1350-51 (N.D. Ill. 1973).

6/ The prior judicial scrutiny approved of in Osborn must be read in connection with the "precise and discriminate circumstances" of that case and not as a general proposition governing all instances of consensual electronic surveillance. White clearly stands for the proposition that no warrant or court order is a requisite antecedent in the usual case. See, discussion at 401 U.S. at 749 and 753. The applicable principle has been summarized by the Fourth Circuit in the following words:

> Defendant's first claim with respect to the recordings and the transcriptions is that his rights under the fourth amendment were violated. We think the complete answer to this contention is United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (plurality opinion), which held that the fourth amendment requires no prior judicial authorization for governmental electronic recording of a private conversation where one of the parties to the conversation has consented to the surveillance. Since Cohen consented to each recording, it follows that each recording and the transcriptions made from some did not violate defendant's fourth amendment rights and were therefore admissible into evidence.
>
> It also follows that we need not consider the validity of the court orders authorizing the recordings. They were sought and obtained prior to the decision in White, undoubtedly as a precautionary measure on the part of the government. ... White makes clear that no warrant or order is needed....

United States v. Dowdy, 479.2d 213, 229 (4 Cir.), cert. denied, 414 U.S. 823 (1973).

1A

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

New York, New York

In Reply, Please Refer to File No.

Date of Activity: October 4, 1973
Transcribed by: SA Michael V. Guio
Mode: Body Recorder

Set forth below is a verbatim transcription of a portion of a conversation recorded on October 4, 1973, between Harold Whellan and Max Meyers. The conversation occurred at Gold Line, 519 Eighth Avenue, New York, New York.

HW - Harold Whellan
MM - Max Meyers
UM - Unknown male

HW - How you doing?

UM - Trucking business is lousy.

HW - Today broke right open short pant coats.

MM - Yeah, Harold how are you.

HW - Tuesday it broke like, it broke like wide open Tuesday. Tuesday it broke like for me like wide open. Sold 1800 coats Tuesday.

MM - Beautiful, beautiful.

HW - Short coats, re-orders, all of them. Now like once it gets out, its brand new. Started in August. It came up. Now I need to get another contractor. So a contractor of mine came to me from Brooklyn. But I had never been in Brooklyn. In the beginning Jack had said to me. He said, you know,take Trinity. So I explained to him, Jack, I, it's nothing, and ah yet because ah shop because there was no Brooklyn shops yet. So we let it go. Now Joe's brother said to me once if you have anything going to Brooklyn, and you

haven't got anything in New York, we'll either take it or give it to someone.

MM - Well, give it to Joe's brother. You've got a truckman don't you? You've got a truckman, you can't change truckman.

HW - No, I don't have a truckman yet.

MM - Well you have a truckman, Joe is your truckman. He's registered under you, don't kid yourself.

HW - Only not for Brooklyn.

MM - He's got you registered all the way through. You're his truckman.

HW - Jack said Trinity. Said you would say Trinity.

MM - No, I want Trinity but I couldn't do it, forget it. He's your truckman no matter where you go.

HW - Ah, only the island I thought.

MM - He's your truckman no matter where you go. He doesn't go to Brooklyn. He doesn't feel like going, its another story.

HW - Because Trinity goes to Brooklyn.

MM - I'm trying to explain you something. Sure Trinity goes to Brooklyn. But go down there and find out whether they go to Brooklyn or not.

HW - He doesn't, I asked Joe that. I asked his brother once if he goes to Brooklyn.

MM - Well, ask him now.

mb

HW - He say's we'll get rid of it for you.

MM - Well what's the difference, it will cost you the same thing.

HW - I don't mean that. Why not give it to a truckman that. I said to Jack.

MM - I've told you all the way around it doesn't work that way.

HW - You mean I should go to Joe?

MM - If its on your own thing to do that

HW - I wanna do it right, that's why I called you up. Jack says Trinity that's why I says I wanna ask Maxie.

MM - What shop you gonna go to?

HW - Carl's Fa..... I need some pant coats. He made these pants coats for me like 17 years. The same coat like with the shawl collar. When did he make them for you?

MM - When did he make them for you?

HW - Like when I was in business two years ago, and then all the years before that.

MM - And Joe's people can't make them?

HW - They could I need extra pant coats. They got the pant coat shop there of Joe's out on the island is slow. I could use an extra couple of lots and the guy needs work.

MM - A couple of lots does not mean an f..... thing. One way or another it doesn't.

HW - But it does. Whatever I take becomes my truckman.

MM - He doesn't become your truckman, as registered to you, no matter where you go.

HW - I said, you mean Amity.

MM - Amity is your truckman.

HW - The island in Brooklyn?

MM - Everywhere he's your truckman.

HW - You mean Joe?.....

MM - What are we talking about? We're talking about 300 coats.

HW - No, its 300 each lot. Could be like thousands now.

MM - It could be, it could be nothing. It could amount to nothing. Its petty.

HW - Max, I'm just starting in business. I've already started to do pretty well.

MM - Who's talking about anything else, if I can't service you in Brooklyn, we'll find someone who can.

HW - In other words, I have to ask Joe if its okay to use Trinity if he doesn't go to Brooklyn.

MM - That's right. That's the smart thing to do. What's wrong with that. He don't go to Brooklyn might be better yet.

HW - It's alright, he might say yes, Trinity.

MM - Maybe he's got one of those things there in Brooklyn. You can get it cheaper.

HW - I'm not looking cheaper. I paid 26 for 'em from him. I can pay these kind of pa..... I've been paying 5.75 out and I paying my shop six. My joint board week work six dollars. Oh, that's week work incidently. See I wasn't sure because they were trying to get them on piece work, but they couldn't do it. He stayed week work. He said he couldn't work it.

MM - What's the problem?

HW - No problem settling.

MM - No problem whatsoever. Talk to Joe. Talk to him, maybe you can do it the other way. Do it nice. You're a man.

HW - That's why he came to you. That's why I gave you an answer. Nothing more to talk about.

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION
New York, New York

In Reply, Please Refer to File No.

NOV 12 1974

Listed below is a transcription of a conversation between Harold Whellan, Max Meyers and Jack Hirsch on February 28, 1974. Transcribed by Special Agent (SA) Joseph R. Coyne:

W - Harold Whellan
M - Max Meyers
H - Jack Hirsch

M Where the hell have you been?

W I came back, I got the message, I ran over and then I called here and I said I would be down in ten minutes and he said he wasn't here yet, Max.

M (Inaudible)

W He says all right, all right.

M (Inaudible) nothing, the other thing is (inaudible) as far as the money, forget it.

W Mr. Hirsch, how are you? Why are you so (inaudible) they didn't bury you yet.

M That's the best (inaudible) in the world.

H What do you mean they didn't bury me yet?

W You only went to the funeral.

M Listen to me a minute. But he forgot about labor, a lot of people have got to (inaudible) in the world.

W (Inaudible)

M Wait a minute, wait a minute. You have joined an association, which, that's part of you (inaudible) do you want to quit? You can't quit the association, you joined it, they can sue you.

W They broke it though, the association. They broke the agreement, Jack knows that. Watch it Max's he he wants to (inaudible)

M Go ahead, go ahead. Come on let's go over here.

W Let's go over here, we will be out of the way.

M That's better (inaudible) has Jack made an agreement for you this is it, there is nothing (inaudible)

W Harold, not counting the organization department

M You got the best lawyer in the world. He is the best guy, he knows every guy in there.

W In other words, what if we do five times as much as that, it will be a hundred thousand. Who wants to pay a hundred thousand?

H You'll pay a hundred thousand.

W I think we should go non-union.

H If you do the work.

M Wait a minute, let me tell you something.

H You'll pay a hundred thousand.

W I think we should go non-union.

M No shot in the world no shot in the world. You want to know something, you go non-union, you wind up in the can. Forget about it. In the first place, let me tell you something, can I tell you something.

W Whose going to make his work.

M All right, all right, all right (inaudible)

W I paid the taxes when I used taxes

M Wait a minute, you didn't even hear, what I said to you you have no advantage, that's number one; number two, when you are making it a little chaper your giving it away to the customer.

W There, you have got a point.

M Hey look, I have been in the clothing business a lifetime. Harold, you are getting along beautifully, you're going to have rough streak, you can't help it.

W Well, we are trying.

M (Inaudible)

W I have got a low overhead (inaudible)

H What I am trying to find out in front of Max is, some guy from the union is coming up; a guy from Local 10, Mat, he is a very nice guy.

M Good.

H They are going to say to him, what do you want? I am to open a cutting room. They'll say okay open a cutting room. What are you going to say?

W I am going to say, I have a cutting room now that I can take. It's set up. I can take half of it.

M Is it union?

W No, but they will go union.

M They'll go union?

W Yeah.

M They'll go along with you. They will be tickled to death.

W But a man in the union. You told me the other day one union man to the

M No, no, will they go union, no bullshit, I mean

W Yes, I am saying yes.

M Did you lie?

W I wouldn't do it (inaudible) I want you here.

M Wait a minute.

W I don't know what this guy wants.

M No, no, listen to me, Harold, listen to me. If you lie, a lie comes back too fast. You know what happens (inaudible)

W They'll stop it in a minute, right; and he is not looking for trouble because he has got his own job, elsewhere

M He happens to be a nice guy (inaudible)

W Or another thing, I can start one but then I have to go another expense - I have got a zip, well cutter, used to work for zip - well to run it, take, take a space

M Where, you mean rent a space?

W Rent a space and start cutting

H Go ahead

W That is an expense though, which is

M What expense? How much of an expense is it?

W To set up a cutting room, how much expense; here I eliminate it all

H Open up a cutting (inaudible)

M I tell you what to do wait a minute

H (Inaudible)

M Wait a minute, wait a minute. Will you listen to me a minute, it might be better for him the other way they could rob him, you know, everything, all your money is laid on the table

H (Inaudible)

W It's a good friend of mine he doesn't (inaudible)

M You want to know something these guys have no work, they have no advantage being non-union because they'll get different cutting from other places

W He pays rent every month, consolidated trucking, so it must be. He has nothing to store in his basement.

M What is it; but listen (inaudible)

W If I do it, if Jack does it I do it. He knows I go to him.

M Well, Jack, what does Jack know?

W I just want to get by the first (inaudible)

M In other words Jack (inaudible)

W I want to be, I'll give him the union. Before I do anything I'll go to you. I'll give him a union cutter, right? You said one cutters an ought in a new business

M (Inaudible) you know I told you

W (Inaudible)

M Wait a minute, wait a minute (inaudible) one cutter, no problem about you. It gets very (inaudible) what did I tell you when I was up to see you. When the guy comes up refer him to Jack.

H Going to be their

W He said to Abe, Sid, he knew you were going to a funeral. He said don't dare don't dare tell to him if Jack's not there.

H Naw

W I wouldn't, I would have sent him.

H Expect him to call, but he only came back yesterday.

W Now, with this thing, you're going to take care of this?

M Harold, Harold.

W Do I have an obligation with anything Jack?

M What obligation?

H I have to back him.

W I mean any, you know anybody. Do I have an obligation with the bill taking care of the bill?

M I don't think so, Jack.

H I told you that.

M Jack.

W Yeah, well let me know.

H (Inaudible) isn't in town, he won't be in town until Monday. He called me, he called me.

M He might have to pay for union labels.

H That's what I told him.

M Yeah.

H That's what I told him, before

W But I mean the other thing

H I sent him a message.

W I mean the other thing

M I, Jack, Jack, you might be able, I don't think so

H Twenty thousand dollars

M No

W (Inaudible) hope it's a hundred.

M It's got to be more than a hundred.

W It's twenty thousand now for three months

M It's got to be more than a hundred because you are going to do business

W That's what I am saying

H Three months it was twenty thousand dollars

M He made a living. You know what the man said to you.

W The man here.

M You want to talk, I have the biggest tough guy in the world.

W He said, he said in one bill I pay right away. He never sends a bill yet. His partner sent me a bill. I never told you don't send me a bill.

H I didn't want to take your money.

M Why not?

H If you were rich (inaudible)

W All right so.

H (Inaudible) won't be here until Monday.

W All right, but the other appointment we might have tomorrow.

M When your man from the cutters union come up

H And he is a very nice fellow

M A very nice, incidentally, I am going to say this in front of Jack, you can do anything you want; people don't make a living from the union, you give the union a Christmas gift every once and awhile.

H You don't tell me how to do it.

W I do it as Zip-well, whatever he said. Whatever he said I did. Zip-well he always tod me

M Will you listen what I tell you, you wat to know something, the guy that's coming up not for Jack that's looking, but Jack

H No, no, no, they met with another guy there, he matched one of the head guys. When he gets through they'll give him some guy, let me find out who he is

M The business agent (inaudible) either one of us

W He send him up alone then Jack. Is that what you mean, Max, send him up alone.

M Okay.

W So we're set. Make sure you got the bill. Do you like my place?

M I love your place.

W Jack

M I love your place. Can I hang out there?

W Yes sir, you're invited all the time, Max, you don't come up the place, he flipped when he saw the place.

M All right now are you happy.

W Twenty-one thousand dollars went

H You're walking out smiling

W He flipped when he saw the place. He didn't think (inaudible) into anything else.

M It's a beautiful place, beautiful place.

W Thank you, sir.

M You know what's going to happen, I am going to become your best customer, as soon as I get around thirty years younger (inaudible)

W No, no, no, no, that's one thing that's exclusive in the place. The girls are mine. That's one thing that's exclusive.

M You walking around without a coat.

W I never wear a coat, unless it rains, Jack

M Step outside

W Yeah.

M Now (inaudible) outside, ask him, I didn't want to ask him because I think he is a little, a little to (inaudible) but if he can take you out of (inaudible) twenty tell him you expect to make strictly suburban shit (inaudible) on the side, he didn't tell you that.

W But you drop a hint to him, drop a hint to him.

M You follow the stuff

W I will, but you drop the hint. I'll start it. Thanks Max.

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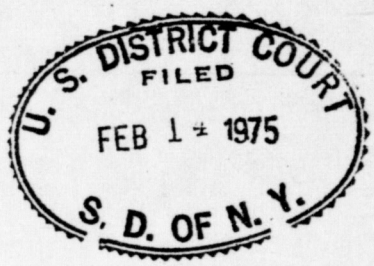

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES of AMERICA

-against-

MAX MEYERS,

Defendant.

75 Cr. 4
(JMC)

#41887

----------X

MEMORANDUM DECISION

CANNELLA, D.J.:

Max Meyers is charged in Indictment 75 Cr. 4 in each of two counts with having given false testimony before a Grand Jury of this district in violation of 18 U.S.C. § 1623. A trial was had before this Court sitting without a jury (the defendant having waived his right to a trial by jury) on February 3, 1975. Neither party has requested that we "find the facts specially" and, hence, we "make a general finding" pursuant to Fed. R.Crim.P. 23(c). (Indeed, the defendant has specifically waived any findings of fact by the Court.) Meyers has moved for a judgment of acquittal on each count under Rule 29, Fed.R.Crim.P. That motion is hereby denied. The defendant is found guilty as charged.

The evidence of Meyers' guilt is overwhelming. The Government has proven every element of the crime charged in each count of this indictment by credible evidence beyond a reasonable doubt.* See, United States v. Stone, 429 F.2d 138, 140 (2 Cir. 1970) (elements of the same offense under 18 U.S.C. § 1621) and United States v. Kahn, 472 F.2d 272, 283 (2 Cir.), cert. denied, 411 U.S. 982 (1973) ("The substantive elements of perjury are the same under either statute [§ 1621 and § 1623]...."). There is no doubt on the evidence in this case that Meyers' testimony to the Grand Jury was false and that these falsehoods were material under the applicable legal standards. United States v. Lee, ____ F.2d ____, No. 74-1925 (2 Cir. Jan. 9, 1975); United States v. Mancuso, 485 F.2d 275, 280-81 (2 Cir. 1973) (and the cases there cited); United States v. Carson, 464 F.2d 424, 436 (2 Cir.), cert. denied, 409 U.S. 949 (1972).** See also United States v. Paolicelli, 505 F.2d 971, 973 (4 Cir. 1974); United States v. Devitt, 499 F.2d 135, 138-39 (7 Cir. 1974).

The Government has shown to our satisfaction beyond a reasonable doubt that Meyers acted willfully and knowingly in giving false testimony to the Grand Jury and

that he was possessed of an intent to lie. In this regard the Court finds Meyers' trial testimony to be inherently incredible and not worthy of belief. His assertedly poor memory is belied by the definite and certain responses which he gave to the questions put to him in the Grand Jury. (His purported inability to remember the number of months between October and February is indicative of the nature of his trial testimony.) In short, we find that Meyers knew full well that his statements to the Grand Jury were false, that he made them willfully and that he intended to lie to that body. Despite his protestations to the contrary, we find that Meyers does not now suffer (and did not then suffer) from any lapse of memory other than that which is of his own choosing.

We have considered the other matters raised in defendant's post-trial memorandum and they do not persuade us to reach a contrary result. The claim that Meyers should have been advised of the existence of the tape recordings of his conversations with Whellan which were in the Government's possession when he testified before the Grand Jury has recently been rejected. United States v. Dowdy, 479 F.2d 213, 230 (4 Cir.), cert. denied, 414 U.S. 823 (1973):

> Finally, we have examined the record in detail and we can find no support for defendant's argument that he was entrapped by the United States Attorney in testifying before the grand jury, where he denied the conversations which had been recorded. The essence of the crime of perjury is a willful untruth, under oath, in a material statement. While the United States Attorney, by inviting defendant to testify before the grand jury, may have provided defendant with the opportunity to commit perjury, the record is absolutely devoid of any evidence that the United States Attorney suggested what defendant should say when he testified. Legally, as well as factually, there was no entrapment. Certainly there was no obligation on the part of the United States Attorney to advise the defendant of evidence which the former had in his possession or of which he was aware. See United States v. Winter, 348 F.2d 204 (2 Cir.), cert. denied 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed.2d 360 (1965); LaRocca v. United States, 337 F.2d 39 (8 Cir. 1964). [Emphasis added.]

See also, United States v. Carson, supra; United States v. Fiorillo, 376 F.2d 180, 184 (2 Cir. 1967).

Accordingly, Max Meyers is found guilty as charged in Counts One and Two of Indictment 75 Cr. 4. A presentence investigation is hereby ordered and this matter is placed on the calendar for 9:30 A.M. on March 25, 1975 for imposition of sentence. Present bail conditions are continued.

SO ORDERED.

John M. Cannella

JOHN M. CANNELLA, U.S.D.J.

Dated: New York, N.Y.
February 13, 1975.

FOOTNOTES

* The elements of the crime of perjury under § 1623 other than those specifically found by the Court in this decision have been stipulated to by the parties. See, Court's Exhibit 1.

** As the Court of Appeals well stated in Carson, 464 F.2d at 436:

> The second claim is that since the prosecution had the tape recordings of the conversations held in Senator Fong's office as well as the testimony of Brana and Hellerman, there was no doubt whatsoever that appellant had met the persons inquired about, and therefore appellant's answers to the questions were not material to the grand jury investigation. Appellant misunderstands the purpose and operation of the perjury statute, 18 U.S.C. § 1621 [or § 1623]. "Essentially, the statute punishes lying under oath before a federal official or tribunal.... To be within the reach of section 1621 [or § 1623], the lies must be material, which in this case means that 'the false testimony ... [must have] a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation.'" United States v. McFarland, 371 F.2d 701, 703 (2d Cir. 1966), cert. denied, 387 U.S. 906, 87 S.Ct. 1689, 18 L.Ed.2d 624 (1967); United States v. Marchisio, 344 F.2d 653, 665 (2d Cir. 1965). The "natural effect or tendency" obviously flows from an assumption on the part of the speaker that the tribunal will believe what he says. On this basis materiality refers to the connection between the words said only by the accused and the objective of the investigation; other testimony which the grand jury has heard, except as it may tend to delimit the objective of the inquiry, is therefore irrelevant to a determination of materiality. And we think it equally obvious that had appellant's false statements been believed, the natural effect would have been to impede the grand jury's investigation.

Mem. Decision + Order

Copy.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES of AMERICA :

-against- :

MAX MEYERS, :

Defendant. :

- X

MEMORANDUM
AND ORDER

#42664

75 Cr. 4

CANNELLA, D.J.:

On February 13, 1975, Max Meyers was found guilty by this Court, sitting without a jury, of two counts of perjury before a grand jury of this district in violation of 18 U.S.C. § 1623. United States v. Meyers, 75 Cr. 4 (S.D.N.Y. Feb. 13, 1975) (Mem. Op.). He has now moved, in advance of imposition of sentence, to dismiss the indictment herein or, alternatively, in arrest of judgment (Fed.R.Crim.P. 6, 12 and 34). Principal reliance in support of the motion is placed in Judge Werker's decision in United States v. Crispino, ____ F.Supp. ____ (S.D.N.Y. 1975), a case which was decided on the same day as this Court found Meyers guilty herein. We have reserved decision on this motion (and adjourned the date of sentence) pending resolution by the Court of Appeals for the Second Circuit of the issue raised by the Crispino decision.

On June 19, 1975 the Court of Appeals, per Judge Weinstein, resolved the question in favor of the authority of Strike Force attorneys to appear before duly empanelled grand juries. In re Persico, _____ F.2d _____, No. 75-2030 (2 Cir. June 19, 1975). Upon the authority and holding of Persico, as well as the spate of district court decisions which have been rendered since Crispino (collected in Persico, slip op. at 4173-74), the instant motion is hereby denied.

In addition to our disposition of the present motion, we take this opportunity to note the following recent decisions of the Court of Appeals on matters relevant to this case. On January 29, 1975, we denied defendant's motion to dismiss the instant indictment for failure of the Government to advise him of the recantation provision contained in 18 U.S.C. § 1623(d). United States v. Meyers, 75 Cr. 4 (S.D.N.Y. Jan. 29, 1975). In so doing, we placed reliance upon the second decision of the Third Circuit in United States v. Lardieri, 506 F.2d 319 (3 Cir. 1974). Three decisions of the Second Circuit rendered subsequent to our decision of January 29th fully support the conclusion there reached, namely that "the Assistant United States Attorney is not required to advise a witness of the

advantages he may gain by invoking the recantation provisions of the perjury statute, 18 U.S.C. § 1623(d)." United States v. Camporeale, ____F.2d ____, No. 74-2603 (2 Cir. April 4, 1975) (slip op. at 2738). See also, United States v. Del Toro, ____ F.2d ____, No. 74-2021 (2 Cir. Feb. 27, 1975) (slip op. at 1977); United States v. Cuevas, ____F.2d ____, No. 74-2110 (2 Cir. Feb. 10, 1975) (slip op. at 1724-25).

Lastly, we note that our rejection of Meyers' claim that he should have been advised of the existence of the tape recordings of his conversations with Whellan and allowed to refresh his recollection from them, Memorandum Decision of February 13, 1975 at 3-4, is fully supported by the Second Circuit's subsequent decisions in Camporeale, supra, slip op. at 2738, and Del Toro, supra, slip op. at 1973.

The defendant's post-trial motion is hereby denied. Sentence shall be imposed on June 30, 1975 at 9:30 A.M.

SO ORDERED.

John M. Cannella
JOHN M. CANNELLA, U.S.D.J.

Dated: New York, N.Y.
June 24, 1975.

I certify
a copy has been
served on the USA
by mail this date
9/3/75